No. 78-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

SEABOARD ALLIED MILLING CORP., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF SOUTHERN RAILWAY COMPANY

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 570 F.2d 1349. A. 303.[1] The order of the Interstate Commerce Commission, entered on September 14, 1977, is not officially reported. A. 286.

[1] "A. —" refers to the appendix jointly filed in this case and in two other cases: *ICC* v. *Seaboard Allied Milling Corp.*, No. 78-597, and *Seaboard Coast Line R.R.* v. *Seaboard Allied Milling Corp.*, No. 78-604. In each case review is sought of the same Court of Appeals' decision. The cases have been consolidated by this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1978. A timely filed petition for rehearing *en banc* was denied by order entered on May 12, 1978. A. 317. By orders of August 3 and September 1, 1978, Mr. Justice Blackmun extended the time to petition for certiorari to October 9, 1978. The petition for a writ of certiorari was filed on October 6, 1978, and was granted by this Court on January 8, 1979. A. 319. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 13(1), 15(8) and 15(17) of the Interstate Commerce Act as amended, 49 U.S.C. §§ 13(1), 15(8), 15(17),[2] are set forth in an addendum at pp. 1a-6a, below.

QUESTION PRESENTED

Whether the discretionary refusal of the Interstate Commerce Commission to suspend and investigate a tariff prior to its effective date is subject to judicial review, when the refusal does not adjudicate the lawfulness of the rate and leaves the shipper free to challenge the rate in a complaint proceeding on any ground normally available under the Act.

[2] Public Law 95-473, approved on October 17, 1978, codified the Act. 92 Stat. 1337. Under that codification, Sections 13(1), 15(8) and 15(17) have become 49 U.S.C. §§ 11701, 10707, 10727. However, the text of Public Law 95-473 and its legislative history both make clear that no substantive changes in the Act are intended by the codification. See enacting clause and Section 3(a) of Public Law 95-473, which provides that the codification "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. See also H. Rep. No. 1395, 95th Cong., 2d Sess. 4, 9 (1978); *Muniz* v. *Hoffman*, 422 U.S. 454, 470, 474 (1975). Since the original numbering system was used by both the Commission and the Court of Appeals, that original system will for clarity's sake be retained here.

STATEMENT

A. The Statutory Framework

Under the Interstate Commerce Act ("the Act"), railroads initiate rate changes by filing tariffs with the Interstate Commerce Commission. The Commission's prior approval of new tariff filings is not required but the railroads must provide advance notice, generally 30 days, before the change becomes effective.[3] Once the tariff has been filed, Section 15(8) of the Act, 49 U.S.C. § 15(8), provides in permissive language that the Commission "may" conduct an investigation into the lawfulness of a new rate. If an investigation is ordered, the Commission "may" under Section 15(8), in conjunction with the investigation, suspend the effectiveness of the new rate for seven months (or under certain limited circumstances for up to ten months) beyond the original effective date.[4]

Suspension and investigation under Section 15(8) are closely intertwined. Suspension is available only when the Commission orders an investigation, and it

[3] See Section 6(3) of the Act, 49 U.S.C. § 6(3), now codified as § 10762. See also *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) ("*SCRAP I*"); *Aberdeen & R.R.R.* v. *SCRAP*, 422 U.S. 289, 311 (1975) ("*SCRAP II*").

[4] Section 15(8) was added by the 1976 Railroad Revitalization and Regulatory Reform Act ("the 4R Act"), Public Law No. 94-210, 29 Stat. 36-37. Prior to that time former Section 15(7), in successive sentences, gave the Commission the same discretionary authority to investigate and to suspend railroad tariffs prior to their effective date. *United States* v. *SCRAP*, 412 U.S. at 673-74.

serves to provide time-limited temporary relief pending the results of the investigation. Each year many thousands of tariffs are filed by railroads, motor carriers and water carriers. In deciding which tariffs warrant suspension and investigation, the Commission exercises its expert discretion in a swift and informal manner without any hearing or formal proceeding.[5] It makes no final determination whether a violation of the Act exists and confines itself to the "preliminary assessment" appropriate to a discretionary enforcement decision. See *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16.

When the Commission declines to order a suspension or investigation, the tariff becomes effective automatically at the end of the notice period as a carrier-made rate. Such a rate is no way prescribed or approved by the Commission. Any shipper may file a complaint with the Commission under Section 13(1) of the Act, 49 U.S.C. § 13(1), challenging such a rate on account of any alleged violation of the statutory standards. Unlike the suspension and investigation power given to the Commission by Section 15(8), the Commission's obligation to entertain a complaint under Section 13(1) is mandatory, not permissive. Section 13(1) affirmatively requires the Commission to investigate any matter complained of, unless the carrier promptly satisfies the complaint, or the complaint provides no basis whatsoever for investigation.

[5] The determination is based merely upon shipper protests and railroad replies. These may often be in telegraphic form. No transcript is kept; no oral argument occurs; and any statement by the agency is usually quite brief and is not officially reported. See 49 C.F.R. § 1100.200.

If the Commission in the course of a Section 13(1) complaint proceeding finds a violation of the Act, it can declare the rate unlawful and it can also prescribe a lawful rate. Section 15(1) of the Act, 49 U.S.C. § 15 (1).[6] In addition reparation for *past* injury is available to the complaining shipper. Sections 8 and 9 of the Act, 49 U.S.C. §§ 8-9.[7] A Section 13(1) complaint proceeding thus provides a full and final adjudication of the lawfulness of the carrier-initiated rate. This adjudication results in a final order subject to full judicial review.[8]

In sum, the Act contemplates two different procedures that may apply to a carrier-filed tariff. Under Section 15(8), the suspension and investigation power may be used, at the Commission's discretion, to defer and investigate a new rate even before it becomes effective; but this is a drastic remedy that can inflict irreparable injury on the carrier and it is applied to only a limited number of the many tariffs filed each year.[9] Under Section 13(1), by contrast, the shipper is ordinarily entitled to an adjudication of the lawfulness of

[6] Section 15(1) is now codified as § 10704. See also p. 14, n.22, below.

[7] Sections 8-9 are now codified as § 11705. See also p. 14, n.23, below.

[8] See, *e.g., Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade,* 412 U.S. 800 (1973); *Burlington Northern, Inc.* v. *United States,* 555 F.2d 637 (8th Cir. 1977).

[9] Irreparable injury results to the carrier where a suspension of an increased rate is ordered because the railroad irrevocably foregoes any increased revenues during the suspension period. Unlike the shipper, the railroad has no reparation remedy against the shipper even if the suspended rate is later found to be entirely lawful.

an effective rate; the rate must be paid in the interim, but a reparation remedy is available if the shipper prevails on the merits.

B. The Proceedings and Decision Below

On August 15, 1977, the railroads in Southern territory filed a tariff, effective in 30 days, containing a three-month seasonal rate increase for the rail transportation of specified grains.[10] See A. 25. Such seasonal increases were specifically authorized by Congress in the 1976 4R Act,[11] in order to reduce peak-period car demand and traffic congestion and to generate additional rail revenues for the hard-pressed railroad industry.[12] Since the proposed tariff was intended to operate only for three months from September 15 to December 15, 1977, suspension for the standard seven-month period would effectively have negated the adjustment.

Following the filing, shippers filed requests for suspension and investigation, charging that the rates violated various individual sections of the Act. In addition

[10] The railroads proposed a 20 percent increase for the peak period. A. 26. Elasticity studies indicated that a larger increase—*e.g.*, 35 percent—might well have been warranted. A. 27.

[11] See Section 202(d) of the 4R Act, adding Section 15(17) to the Interstate Commerce Act. 49 U.S.C. § 15(17), now codified as § 10727. See also 49 C.F.R. § 1109.10, implementing Section 15(17).

[12] Concentration of shipments in a limited period has repeatedly resulted in extra railroad costs, car shortages, and other inefficiencies. See A. 28. The objective of seasonal rates is to ameliorate these conditions by providing shippers with an incentive to schedule their shipments over a longer period and by recouping for the railroads extra costs imposed by peak-load shipments. See S. Rep. No. 499, 94th Cong. 1st Sess. 49 (1975).

to boilerplate charges (*e.g.*, A. 193-94) that the rates were unreasonable under Section 1, discriminatory under Section 2, and prejudicial under Section 3,[13] a few shippers also asserted (*e.g.*, A. 159) that the new rates would in a very limited number of instances violate Section 4(1) of the Act, popularly known as the long-and-short-haul clause.[14] Among the anti-discrimination provisions Section 4 is unusual in providing that its requirements may be waived by application to the Commission. This waiver is frequently sought and received by the railroads, but no such permission was sought in this case because the railroads did not believe that their rate change would result in violations of Section 4.[15]

On September 14, 1977, the Commission announced that it "decline[d] to exercise [its] authority to suspend," and it determined not to investigate the increase. A. 288. The Commission did not purport to adjudicate the existence of any Section 4 violations; indeed, it admonished the railroads to remove promptly any Section 4 violations that might be called to their

[13] 49 U.S.C. §§ 1-3, now codified in pertinent part as §§ 10701, 10741.

[14] 49 U.S.C. § 4(1), now codified as § 10726. This provision makes it unlawful for a carrier to charge higher rates for a shorter distance than for a longer distance which includes the shorter one, unless the approval of the Commission is obtained. None of the protesting shippers asserting Section 4 violations claimed that their own traffic was affected. See A. 160, 243-46, 281.

[15] Because the rate change involved a flat percentage increase on all such grain rates in Southern territory (see p. 6, n.10, above), it would not in general alter existing relationships. If Section 4 departures occur in a few exceptional instances, they can readily be corrected with no effect on the preponderance of rates. See A. 293.

attention. A. 288. Since the Commission declined to intervene, the tariff should have taken effect by operation of law on September 15 as a carrier-made rate, subject always to subsequent shipper complaints under Section 13(1) of the Act.

Instead, on September 14, 1977, certain of the shippers sought and obtained an *ex parte* stay from the United States Court of Appeals for the Eighth Circuit (A. 295), despite the repeated rulings of this Court that to grant a stay or an injunction, before the Commission has finally determined the lawfulness of the rate, represents a forbidden intrusion into the administrative domain.[16] The temporary stay was dissolved after a hearing on September 22, 1977 (A. 298), and the rates became effective on September 24, 1977. Judicial review then proceeded, despite the objection of the Commission and the railroads that a preliminary refusal to suspend and investigate is not a final or reviewable order.[17]

On February 16, 1978, the lower court issued its opinion (570 F.2d 1349 (A. 303)), holding that the Commission's refusal to investigate was a reviewable order and directing the Commission to undertake an investigation of the seasonal rate increase involved in this case. This holding on reviewability directly conflicted with the District of Columbia Circuit's decision in *Asphalt Roofing Mfrs. Ass'n* v. *ICC*, 567 F.2d 994

[16] *United States* v. *SCRAP*, *supra*, 412 U.S. at 691; *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 669-70 (1963).

[17] 28 U.S.C. § 2342(5) provides for review only of "final" orders of the Commission.

(D.C. Cir. 1977), which ruled that a Commission refusal to investigate under Section 15(8), like a refusal to suspend, is a discretionary matter which is not subject to judicial review. The lower court's decision also disregarded decisions of this Court that refusals by administrative agencies to undertake an investigation are not reviewable determinations, and it ignored numerous decisions of other lower courts holding that refusals to suspend or investigate are unreviewable. See p. 22-25, below.

The lower court's decision also reflected several serious misunderstandings. The court appeared to believe that the ICC had begun and then terminated a Section 15(8) investigation of the Section 4 allegations (A. 315), although in fact the Commission clearly declined to commence an investigation. See A. 288. The court also suggested that the Commission's action was "equivalent to a finding of lawfulness" of the rate change (A. 314), despite the Commission's specific statement that it was not deciding whether or not a violation of the Act existed. A. 288. Finally, although the Section 13(1) complaint remedy by its own terms extends to *any* violation of the Act (see p. 13, below), the lower court apparently believed that it did not extend to all violations. A. 312.

Ignoring Section 15(8)'s statutory declaration that the Commission "may" begin a suspension and investigation proceeding, the lower court explicitly ruled that the Commission has a "duty" to investigate a "proposed tariff" where "substantial" issues are presented. A. 312. Since it deemed the Section 4 issues substantial, the court remanded with directions that the Com-

mission conduct such an investigation. A. 316.[18] This Court then granted certiorari, following petitions filed by the railroads and the Commission and a memorandum supporting certiorari filed by the United States. A. 319-21.

SUMMARY OF ARGUMENT

Section 15(8) of the Interstate Commerce Act provides that the Commission "may" investigate a carrier-filed tariff prior to its effective date and, where investigation is ordered, "may" suspend the tariff for a limited period. The Commission's determination whether to exercise that discretionary authority reflects its prelimiary and abbreviated judgment whether intervention prior to the tariff's effective date would be appropriate. *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16. A determination not to intervene in no way constitutes a final adjudication of the lawfulness of the rates proposed in the tariff and does not preclude the shipper from obtaining a final adjudication of the rates under Section 13(1) of the Act. *Id.*

Under Section 13(1), the Commission has a mandatory obligation to investigate charges; such complaints may embrace any violation of the Act; and the normal arsenal of Commission remedies, including reparations, is available. Accordingly, the principle of exhaustion of administrative remedies, repeatedly recognized by this court (*e.g., Parisi* v. *Davidson* 405

[18] Further Commission proceedings have been held in abeyance, with the acquiescence of the lower court, pending resolution of this case. Although the seasonal rates in question have long since expired, the possibility of reparations precludes any claim of mootness, quite apart from the recurring nature of the reviewability issue.

U.S. 34 (1972)), requires that shippers utilize Section 13(1) complaint remedies to obtain a final and specific administrative judgment suitable for judicial review. By contrast, review of a refusal to investigate or suspend would inject the court prematurely into the administrative process and require it to decide issues in the absence of a complete administrative record and an initial Commission determination on the merits.

The discretionary nature of the Commission's authority to refuse to investigate and suspend is confirmed by a plain reading of the language of the statute and by controlling precedent. It has long been established that a refusal to suspend is unreviewable (*e.g., Port of New York Authority* v. *United States,* 451 F.2d 783, 786 & n. 12 (2d Cir. 1971)), and a refusal to investigate is controlled by the same statutory language and principles. *Asphalt Roofing Mfrs. Ass'n* v. *ICC,* 567 F.2d 994 (D.C. Cir. 1977). This Court itself confirmed that "whether the Commission should make an investigation of a § 13a(1) [train] discontinuance ... is not reviewable" (*City of Chicago* v. *United States,* 396 U.S. 162, 165 (1969)), and a Commission refusal to investigate a rate adjustment under Section 15(8) is an *a fortiori* case for declining review.

The lower court's assertion in this case that it could review a refusal to investigate was based on basic misunderstandings of what the Commission decided and the scope of remedies available to shippers under the Act. Contrary to the lower court's understanding, the Commission did not here determine the lawfulness of any rate (A. 288) and it does not limit the grounds on which shippers can challenge a rate under Section

13(1). The lower court was equally mistaken in relying on the decisions of this Court in *City of Chicago* and in *Alton R.R.* v. *United States,* 287 U.S. 229 (1932). Each of those cases involved determinations on the *merits* of controversies (396 U.S. at 163, 166, 287 U.S. at 231, 237) and both situations are far removed from the Commission's action here in declining to adjudicate the merits and remitting the shippers to their Section 13(1) remedies.

Finally, judicial review of the Commission's refusal to investigate under Section 15(8) would have serious adverse consequences. It would enlarge and complicate the Commission's decision-making process; it would add to the already significant burdens on appellate courts; it would give shippers an unjustified opportunity to attack the same rate twice in appellate proceedings; and it would threaten the Commission's impartial resolution of rate-making questions and its control over the timing of new rates. The Court is entitled to consider these untoward results in construing the statutory plan, especially where, as here, such considerations of policy reinforce the clear thrust of exhaustion principles, statutory language and applicable precedent.

ARGUMENT

I. Review Would Violate the Principle of Exhaustion of Administrative Remedies.

It is well settled that, where there exists an administrative remedy that may afford the complainant full relief, judicial review is not ordinarily available until

that remedy is exhausted.[19] The familiar reasons for the doctrine include conservation of judicial resources, the opportunity to develop a more complete record, and the desirability of avoiding interference with the administrative process and of invoking administrative expertise to the fullest extent possible.[20] The lower court's decision in this case is directly inconsistent with the exhaustion principle.

When the Commission in this case refused to commence a suspension and investigation proceeding under Section 15(8), it left open to aggrieved shippers the full and complete remedies available through Section 13(1) complaint proceedings. Unlike a request for action under Section 15(8), investigation of a Section 13(1) complaint is mandatory; the statute makes it an affirmative obligation of the Commission to investigate any matters complained of unless the carrier satisfies the complaint or the matter is frivolous, and this guarantees the shipper the right to have determined the lawfulness of any rate affecting its shipments.

Under Section 13(1), the shipper may complain "of anything done or omitted to be done [by a rail carrier] in contravention of the provisions [of the Act] . . . ." In fact, complaint proceedings have on occasion been

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[19] *Schlesinger* v. *Councilman,* 420 U.S. 738 (1975); *McGee* v. *United States,* 402 U.S. 479 (1971); *FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492 (1955); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938).

[20] As the Court said in *Parisi* v. *Davidson,* 405 U.S. 34, 37 (1972), "[t]he basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies."

directed against each of the types of violations charged in the present case, including violations of Sections 1, 2, 3 and 4 of the Act.[21] Thus, the same substantive violations can be asserted, whether a complaint proceeding or a suspension and investigation proceeding is involved.

Finally, ample remedies are available in a complaint proceeding. The Commission may determine that a rate is unlawful; it may prescribe a new rate; and it may award reparations for damages done where the unlawful rate has caused injury. See p. 5, above. All these remedies have been afforded in past complaint cases.[22] While the rates involved in the present case have expired, the shippers are still free to seek an adjudication and reparations in a complaint proceeding since Section 13(1) extends to alleged past violations as well as to existing ones.[23] Following an ad-

[21] *E.g., Shaw Warehouse Co.* v. *Southern Ry.*, 308 I.C.C. 609, 611-12 (1959), *appeal dismissed*, 186 F. Supp. 29 (N.D. Ala. 1960) (§§ 2 and 3); *Darling & Co.* v. *Alton & S.R.R.*, 299 I.C.C. 393 (1956) (§§ 1 and 3); *Sioux City & N.O. Barge Lines, Inc.* v. *Chicago & N.W. Ry.*, 303 I.C.C. 537 (1958) (§§ 1, 2 and 3); *William N. Feinstein & Co.* v. *New York Central R.R.*, 313 I.C.C. 783 (1961), *aff'd*, 317 F.2d 509 (2d Cir. 1963) (§§ 1, 4).

[22] *E.g., Hutchison Iron & Metal, Inc.* v. *Baltimore & O.R.R.*, 316 I.C.C. 667, 670 (1962) (reparations); *Americus Oil Co.* v. *Atchison T. & S.F. Ry.*, 309 I.C.C. 647 (1960) (reparations and declarations of unlawfulness); *National Electrical Mfrs. Ass'n* v. *Aberdeen & R.R.R.*, 349 I.C.C. 502, 514 (1974), *aff'd in part and rev'd in part*, 407 F. Supp. 598 (W.D. Pa. 1976) (the power of prescription held available but not exercised); *George A. Hormel & Co.* v. *Atchison T. & S.F. Ry.*, 263 I.C.C. 9, 61 (1945) (prescription).

[23] Expired rates formed the basis for part of the reparation claim in *Hutchison Iron & Metal, Inc.* v. *Baltimore & O.R.R., supra*, 316 I.C.C. 667, and for the entire reparation claim in *Americus Oil Co.* v. *Atchison T. & S.F. Ry., supra*, 309 I.C.C. 647. The reparations award includes interest on the amount assessed.

judication on the merits, judicial review is available. See p. 5, n.8, above.

The lower court's failure to abide by the exhaustion doctrine appears to rest on several of the basic misunderstandings reflected in its opinion. Significantly, the court appeared at several points to believe that the Commission had in fact decided the Section 4 allegations on the merits. It stated that the Commission's order "in effect is a final order on the § 4(1) issue" (A. 313) and that "[f]ailing [to investigate] places the proposed tariffs in effect and is a finding of lawfulness of the tariffs." A. 314. The lower court's error is patent, since the Commission's failure to investigate adjudicated no violation issue on the merits and is clearly not a "finding of lawfulness" of the seasonal rates.

The Commission's opinion expressly shows that it did not make any final determination of the Section 4 issue or of any other alleged violation. On the contrary, it admonished the respondents "to take prompt action to remove violations of the long-and-short-haul provision of Section 4(1) of the Act, *if any*" (A. 288 (emphasis added)) and clearly declined to determine the validity of the shippers' "examples purporting to demonstrate . . . departures" from Section 4 or the railroads' contrary "argument and tariff citations to disprove [the shippers'] claims." A. 287. The lower court's further suggestion that failure to investigate a tariff is equivalent to a finding of lawfulness is simply contrary to a book-shelf of settled authority: the cases have repeatedly distinguished between carrier-made rates, which the Commission merely declines to suspend or investigate, and Com-

mission-made rates, which are either specifically approved or prescribed by the Commission.[24]

The lower court also suggested that in complaint cases brought under Section 13(1) the Commission "has apparently limited its authority . . . to the issues of whether the rate as applied is discriminatorily prejudicial or illegal." A. 312. If the lower court's reference to "as applied" meant to suggest that the complainant must be affected by the rates it attacks, this is merely an expression of the settled principle that a party must have some stake in the controversy in order to be heard. Where the party has no stake, it clearly has no grievance, whether a Section 13(1) or a Section 15(8) proceeding is involved. If, on the other hand, the lower court meant to suggest that the Section 13(1) proceeding was limited to certain *types* of violations, this is disproved both by the language of the statute, which embraces "anything done or omitted to be done" in violation of the Act, and by the Commis-

[24] *E.g., Aberdeen & R.R.R.* v. *SCRAP, supra,* 422 U.S. at 311 n.13; *United States* v. *SCRAP, supra,* 412 U.S. at 693 n.17; *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry.,* 284 U.S. 370, 383-88 (1932). The court's discussion in *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487, 493-94 (E.D. Va. 1935), is equally applicable here:

> "[The shippers] take the view that what the Commission did in effect was to determine what would be just and reasonable rates . . . As already pointed out, in our opinion this misconceives what the Commission did. It *prescribed* no particular rates. It merely permitted the carriers to file new rates . . . . It will, therefore, be open to the plaintiffs to present their contentions as to the particular rates affecting them in proper proceedings before the Commission under Section 13 (49 U.S.C. § 13). That is to say, the increased rates now complained of are *carrier made* rates and not *Commission* made rates" (emphasis in original).

sion's own precedents in complaint cases, which embrace each basic type of violation asserted in this case. See p. 14, n. 21, above.[25]

The policies underlying the exhaustion requirements apply with special force to the present situation. The determination whether to suspend and investigate must, given the 30-day limitation, be a swift and informal one, based on a "mix" of judgment factors; both the suspension and investigation decisions involve nothing more than a "preliminary assessment" (see *United States* v. *SCRAP, supra,* 412 U.S. at 692 n.16) and may involve factors having little to do with the lawfulness of the rate.[26] Consistent with exhaustion principles, there is every reason why review should be postponed until a Section 13(1) proceeding has resulted in a final adjudication, based on a complete record, made after the "full hearing" contemplated in such proceedings. See Section 15(1).[27]

[25] The lower court was correct in stating that the burden of proof in a Section 13(1) proceeding is on the challenger (A. 312); but this is true for numerous administrative remedies and does not relieve the party of the obligation to utilize those remedies under the exhaustion doctrine. There is no showing that the Commission has been arbitrary or inflexible in the way it administers burden of proof requirements. If it ever does improperly administer the burden of proof in a Section 13(1) proceeding, judicial remedies are available to correct that situation.

[26] For example, in this case the Commission adverted briefly to the desirability of implementing the rate promptly in view of the experimental character of seasonal rates. A. 289.

[27] *Schlesinger* v. *Councilman, supra,* 420 U.S. at 756 (emphasizing "the need to allow agencies to develop the facts"); *Parisi* v. *Davidson, supra,* 405 U.S. at 37; *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158, 166 (1967). As the court held in *Koppers Co.* v.

The exhaustion doctrine also serves to prevent the premature interference which can warp agency decision-making. As this Court suggested in the *Wichita Board of Trade* case, there is a significant risk that judicial discussion of rates, in anticipation of further agency proceedings, may "imply some view by the [reviewing court] about decisions committed to the Commission by the doctrine of primary jurisdiction." 412 U.S. at 825.[28] The lower court's views in this case about the "substantiality" of the Section 4 allegations (see A. 312-13) inject precisely this kind of inappropriate influence—which would be avoided if judicial intervention were postponed until the Section 13(1) proceeding has been completed and the Commission has reached its own independent decision on the merits.

Lastly, exhaustion principles conserve the courts' own resources.[29] It is entirely possible that, if the

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United States, 132 F. Supp. 159, 163 (W.D. Pa. 1955), in a similar context:

> "It is not for this court to tinker with the delicate and fragile machinery of rate fixing and rate apportionment until the administrative process has been meticulously and stringently followed and exhausted in accordance with statutory requirement."

[28] Similarly, in analogous circumstances in *Arrow, supra*, 372 U.S. at 670, the Court expressed concern that the injunctive relief there sought risked "the hazard of forbidden judicial intrusion into the administrative domain," when review "would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable," prior to Commission consideration of that same issue. *Id.* at 669-70.

[29] *Parisi* v. *Davidson, supra*, 405 U.S. at 37 (exhaustion doctrine avoids "judicial controversies"); *McGee* v. *United States, supra*, 402 U.S. at 484 (doctrine "help[s] to obviate all occasion for judicial review").

exhaustion requirement had been followed, this case would never have reached the courts. For example, the shippers might have concluded that the prospects of success were so slight that the matter was not worth pursuing. Or, if a Section 13(1) adjudication had been sought, the agency decision on the merits might have persuaded the losing side that nothing was to be gained by judicial review. In sum, the policy considerations underlying the exhaustion doctrine, as well as its literal requirements, obligated the lower court to dismiss the petition for review.

Deferral of review is supported not only by principles of exhaustion but by lower court cases expressly applying those principles to require exhaustion of Section 13(1) remedies under the Act, including two decisions affirmed *per curiam* by this Court. In *National Industrial Traffic League* v. *United States*, 287 F.Supp. 129 (D.D.C. 1968), *aff'd per curiam*, 393 U.S. 535 (1969), the failure to exhaust administrative remedies by filing a complaint was the principal ground for dismissing a shipper suit to review the Commission's refusal to suspend a tariff under the motor carrier counterpart to Section 15(8). Similarly, in *Electronic Industries Ass'n* v. *United States*, 310 F.Supp. 1286 (D.D.C. 1970), *aff'd per curiam*, 401 U.S. 967 (1971), a general revenue case, this Court unanimously affirmed the District Court's determination that shippers could not challenge specific rail rates until they exhausted their administrative remedies under Section 13(1).[30]

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[30] See also *National Water Carriers Ass'n* v. *United States*, 126 F. Supp. 87, 90 (S.D.N.Y. 1954), and *Coastwise Line* v. *United States*, 157 F. Supp. 305, 306 (N.D. Cal. 1957), in which three judge district courts similarly denied judicial review, focusing on

The lower court in this case provided no reason for declining to follow exhaustion principles; and so far as any reasons can be discerned, they are based on misunderstandings of the scope of remedies available under Section 13(1). At a time when courts are increasingly burdened by agency review proceedings, there is every reason to insist that litigants utilize all proper means to resolve their controversy before resorting to the courts. Where, as here, the exhaustion requirement reinforces a carefully articulated Congressional plan for processing rate changes, its application is doubly warranted.

II. Review Would Be Inconsistent With the Statutory Framework and Applicable Precedent.

It is well settled that "[t]he starting point in every case involving construction of a statute is the language itself,"[31] and the pertinent statutory language in this case clearly militates against judicial review of a refusal to suspend or investigate. Section 15(8) provides that the Commission "may" order an investigation of a newly filed rate. There is nothing in the statute to suggest that Congress contemplated judicial review of such determinations. Instead, the structure of the Act, reinforced by past practice and interpretive precedent,

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the availability of Section 13(1) complaint proceedings to establish the lawfulness of the rates. In *Coastwise Line*, for example, the court stated that: "[o]nly with the Commission's determination after a hearing conducted pursuant to Section 13 will there be a 'final agency action' subject to judicial review." 157 F. Supp. at 306.

[31] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). See also *62 Cases* v. *United States*, 340 U.S. 593 (1951); *Caminetti* v. *United States*, 242 U.S. 470 (1917).

confirms that judicial review was not intended at this preliminary stage of the rate-making process.[32]

To the extent "agency action is committed to agency discretion by law," judicial review is clearly inappropriate. Administrative Procedure Act § 10, 5 U.S.C. § 701(a)(2). If the permissive phrasing of Section 15(8) is not conclusive, it clearly suggests an intention by Congress to commit to agency discretion the decision whether to suspend or investigate. That interpretation is borne out by the contrasting manner in which Congress framed Section 13(1). That section imposes on the Commission an affirmative obligation to investigate any matters complained of, making an exception only where the complaint is satisfied by the railroad or is clearly frivolous. By contrast with the mandatory duty created by Section 13(1), Section 15(8) merely permits the Commission to investigate and does not obligate it to do so.[33]

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[32] Quite apart from the structure of the Act, it would be contrary to Congress' general policy to permit review of a decision at an intermediate stage of the administrative process. See Administrative Procedure Act § 10(c), 5 U.S.C. § 704 (review of "final" agency action); 28 U.S.C. § 2342(5) (review of "final" ICC orders). The Commission's action here does not finally determine the lawfulness of any rate. See pp. 15-16, above.

[33] Although the recent codification could not in any event alter the substance of Section 13(1) (see p. 2, n.2 above), the codified version of Section 13(1), 49 U.S.C. § 11701, contains the same imperative that the Commission investigate in all cases where the complaint has any reasonable foundation. Previously, Section 13(1) provided that "it shall be the duty of the Commission to investigate" where "there shall appear to be any reasonable ground for investigation." As codified in section 11701 it provides that the Commission may dismiss a complaint only where it "does not state reasonable grounds for investigation and action."

The Commission has possessed the power to institute a suspension and investigation proceeding since the Mann-Elkins Act of 1910. 36 Stat. 539, 552. Yet, in over 60 years of subsequent administration of the Act, it appears that no reported decision has sustained the right of a shipper to challenge the Commission's refusal to investigate under Section 15(8) or its predecessors. The shippers' failure to invoke this claimed right over many years—like administrative inaction over a long period—provides substantial evidence that the prerogative now claimed does not exist. See, *e.g.*, *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, 351-52 (1941). It also affords ample reason why any revision of the statutory plan should be left to Congress.

The relationship between the power to investigate and the power to suspend confirms that refusals to investigate are not reviewable. Three-judge district courts have repeatedly held that refusals to suspend are unreviewable, and these cases include at least one decision summarily affirmed by this Court.[34] Subsequently, this Court has twice cited a number of these same three-judge court decisions with approval in resolving questions involving judicial power to implement or extend

[34] *National Industrial Traffic League* v. *United States, supra; Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 981 (W.D. Wis. 1967); *Movers and Warehousemen's Ass'n* v. *United States*, 227 F. Supp. 249 (D.D.C. 1964); *Freeport Sulphur Co.* v. *United States*, 199 F. Supp. 913, 916 (S.D.N.Y. 1961); *Luckenbach S.S. Co.* v. *United States*, 179 F. Supp. 605, 609 (D. Del. 1959), *vacated as moot*, 364 U.S. 280 (1960); *Coastwise Line* v. *United States, supra*, 157 F. Supp. at 306; *National Water Carriers Ass'n* v. *United States, supra*, 126 F. Supp. at 90; *Carlsen* v. *United States*, 107 F. Supp. 398, 399 (S.D.N.Y. 1952).

the suspension period.[35] The Second Circuit has described as "unassailable" the proposition that Commission decisions not to suspend are unreviewable.[36] Even more recently, the District of Columbia Circuit in *Asphalt Roofing* described this proposition as "firmly established," noting that the decision to suspend is "committed solely to the agency's discretion and is unreviewable by the courts." 567 F.2d at 1001.[37]

The powers to suspend and investigate are so closely interrelated that they must be construed *in pari materia*. The powers are conferred in the same terms in successive paragraphs of Section 15(8). The procedures followed are similar (see p. 4, above); and by its explicit terms, the suspension power is an ancillary one that can be exercised only if an investigation is ordered.[38] The District of Columbia Court in *Asphalt Roofing* followed precisely this reasoning in concluding, after reviewing the relevant cases, that the paral-

[35] *Arrow Transp. Co.* v. *Southern Ry., supra*, 372 U.S. at 670 (citing, *inter alia*, *Carlsen* and *Luckenbach*); *United States* v. *SCRAP, supra*, 412 U.S. at 691-92 (citing, *inter alia*, *Carlsen*, *Luckenbach*, and *Freeport*).

[36] *Port of New York Authority* v. *United States, supra*, 451 F.2d at 786 & n.12, citing both *Arrow* and a number of three judge district court decisions.

[37] The District of Columbia Circuit has repeatedly reached the same conclusion in construing the Federal Communications Act, the Federal Aviation Act, and the Federal Power Act. *Associated Press* v. *FCC*, 448 F.2d 1095, 1103 (1971); *Delta Air Lines, Inc.* v. *CAB*, 455 F.2d 1340 (1971); *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1351 & n.21 (1971), *cert. denied*, 405 U.S. 989 (1972).

[38] Section 15(8)(a) provides that the Commission "may" order an investigation. Section 15(8)(b) states that, "[p]ending a hearing pursuant to subdivision (a), the [tariff] schedule may be suspended . . . ."

lel language required parallel treatment: it found "no ground, on the basis of the Act, for treating the two powers differently for purposes of reviewability" and it held that the unreviewability of refusals to investigate is required "by the cases holding the Commission's decision whether to suspend a rate increase to be unreviewable." 567 F.2d at 1002.

The precedents in this Court confirm that the Commission's refusal to investigate is unreviewable. Particularly significant is this Court's *per curiam* affirmance in *New Jersey* v. *United States,* 168 F. Supp. 324 (D.N.J. 1958), *aff'd per curiam,* 359 U.S. 27 (1959). There, a railroad had filed a discontinuance notice under Section 13a of the Act, which in discretionary language allows the Commission to investigate a proposed train discontinuance.[39] The district court held that the Commission's refusal to investigate was committed "to [its] absolute discretion" (168 F. Supp. at 329) and this Court affirmed summarily. What is more, this Court subsequently cited the *New Jersey* case with approval as holding that "[w]hether the Commission should make an investigation of a § 13a(1) discontinuance is of course within its discretion, *a matter which is not reviewable.*" *City of Chicago* v. *United States, supra,* 396 U.S. at 165 (emphasis added).

This position is consistent not only with *City of Chicago,* but with other cases in which this Court has

[39] 49 U.S.C. § 13a (now §§ 10908, 10909). As with Section 15(8), the Commission is empowered under Section 13a to investigate on its own initiative or at the request of an interested party and, if it determines to investigate, it may suspend the discontinuance for a limited period. If the Commission does not investigate or suspend, discontinuance—like a carrier-initiated rate increase—is self-executing.

held that the mere refusals of administrative agencies to undertake investigations are not reviewable.[40] Indeed, the Commission's refusal to investigate a rate increase prior to its effective date closely parallels a decision by the Department of Justice, which would obviously be unreviewable, not to seek an injunction against a proposed merger. Moreover, the refusal to review a refusal to investigate under Section 15(8) is reinforced by one cardinal consideration that is not always present in other situations: the shipper aggrieved by a Commission refusal not to investigate retains the remedy of initiating Section 13 complaint proceedings.[41]

The lower court was wholly mistaken in thinking (A.311-12) that its decision derives any support from this Court's decisions in *City of Chicago* and *Alton R.R.* v. *United States, supra.*[42] In both cases, the

[40] *E.g., Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (NLRB refusal to issue complaint); *FTC* v. *Klesner,* 280 U.S. 19, 25 (1929) (FTC refusal to issue a complaint).

[41] In sharp contrast, when the Commission refuses to investigate a train discontinuance under Section 13a, train users have no further remedy; the Commission's refusal to intervene is determinative. Consequently, the conclusion of this Court in *City of Chicago* that the refusal to make an investigation "is not reviewable" applies *a fortiori* to a refusal to investigate under Section 13(1), where the shipper retains a reserved remedy.

[42] The lower court cited *Alton* and *City of Chicago* for the proposition that a court may review "the Commission's determination not to pursue its investigation" or its "decision to terminate investigation." A. 311. Quite apart from the fact that *Alton* and *City of Chicago* involved decisions on the merits, the Commission in this case did not terminate or discontinue an investigation: it determined not to begin an investigation (see p. 7, above), the very situation in which *City of Chicago* held that a Commission investigation was "of course" discretionary and review unavailable.

agency orders held subject to judicial review were orders disposing of the controversies involved *on the merits. In City of Chicago,* while observing that a refusal to investigate was unreviewable, the Court found that review was appropriate where the agency began an investigation and terminated it after a finding "deciding [on] the merits"[44] (396 U.S. at 166) that the discontinuance was justified under the public interest standard.[43] Similarly, in the *Alton* case the Commission, after a full investigation, upheld the challenged portion of a divisions order, allocating revenues between railroads, based on a finding that the divisions were "not unjust, unreasonable or otherwise unlawful. 287 U.S. at 231, 237."

Thus, in both *City of Chicago* and *Alton,* there was an adjudication of an controversy "on the merits," based on substantive findings under the statutory standards. To sustain review in such cases is no precedent whatever for review of a refusal to suspend and investigate where, as here, the refusal does not constitute an adjudication of the merits nor impair the shipper's right to obtain an adjudication on the merits in any appropriate proceeding. Rather, the contrast between the situations underscores the absence of

[43] The Commission, applying the substantive standards of the Act, had determined in two separate cases that continued operation of the services in question "was not required by public convenience and necessity and that continued operation would unduly burden interstate commerce." 396 U.S. at 163.

[44] As the Court there held, the Commission's decision was an order which is "final, not tentative . . . . It was entered as the result of a formal controversy . . . and it marked the disposition of the controversy, not a preliminary stage." 287 U.S. at 240.

precedent, in this or any other court, to support the position of the lower court in this case.[45]

Lastly, in opposing certiorari, one group of shipper respondents sought to suggest that a determination not to investigate a Section 4 violation is uniquely reviewable even if refusals to investigate other alleged violations might not be reviewable at this preliminary stage.[46] The implication that the requirements of Section 4 are somehow more stringent or mandatory than other provisions is simply mistaken. If anything, Sections 1, 2, and 3, requiring reasonable and non-discriminatory rates, are even more absolute, because only in the case of Section 4 departures is the Commission specifically authorized to waive the prohibition.[47]

[45] In opposing certiorari, the respondents cited the *Trans Alaska Pipeline Rate Cases,* 436 U.S. 631 (1978). There, the Court determined that the Commission's suspension of a carrier rate for a new service could be challenged on the very limited ground that the Commission had no jurisdiction to suspend a tariff establishing initial rates. The court acquiesced in review only "to the limited extent necessary to ensure" that the suspension orders "do not overstep the bounds of Commission authority" (*id.* at 638-39 n.17) and reaffirmed the proposition of *Arrow* and *SCRAP I* that "federal courts have no power to make 'an independent appraisal of the reasonableness of rates'." *Id. Trans Alaska* lends no support to the lower court's view that a discretionary refusal of the Commission to investigate is reviewable, for such a refusal cannot involve an unlawful assertion of Commission jurisdiction and necessarily reserves to shippers their established remedies under Section 13(1).

[46] Brief in opposition of Seaboard Allied Milling Corp., *et al.,* pp. 7, 9. Neither the lower court (see A.312-13) nor the other shipper respondents (see brief in opposition of Board of Trade, *et al.,* p. 3) advanced such a distinction.

[47] The marginal significance of Section 4 departures in many cases also explains why, as here, the Commission has often merely admonished the railroads in the first instance to remove any such

Section 4's position in the context of the statutory review procedures is exactly like that of Sections 1-3. Violations of Section 4 "may" be investigated under Section 15(8), while it is the "duty" of the Commission to investigate them under Section 13(1); and the same panoply of considerations, including the lack of finality and the obligation to exhaust complaint remedies, apply equally to the refusal to investigate Section 4 violations under Section 15(8). Accordingly, respondents' attempt to sustain the lower court's result, on a ground the lower court itself did not adopt, is wholly unpersuasive.

III. Review Would Complicate and Delay Rate-Making Procedures and Burden the Agency and the Courts.

Together with statutory language and precedent, the practical consequences of a decision are entitled to due weight in construing the statutory plan.[48] In view of the reserved Section 13(1) remedy for shippers, there is no necessity whatever for judicial review at the present stage. Such review would, on the contrary, introduce significant new burdens and complications. This Court has said in the past that it "cannot attribute to Congress an intention . . . which would open the door to obvious incongruities and undesirable possibilities." *United States* v. *Dow, supra,* 357 U.S. at 24-25.

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departures if and when they are actually demonstrated. See, *e.g., Atlantic Coast Line R.R.* v. *Southern Ry.,* 302 I.C.C. 711 (1958), *modified,* 321 I.C.C. 283 (1963); *J. R. Short Milling Co.* v. *Baltimore & O.R.R.,* 301 I.C.C. 605 (1957).

[48] *Romero* v. *International Term. Oper. Co.,* 358 U.S. 354, 371-72, 376 (1959); *United States* v. *Dow,* 357 U.S. 17, 24-25 (1958); *United States* v. *Brown,* 333 U.S. 18, 27 (1948).

The first consequence would be a significant proliferation of agency proceedings. Literally thousands of tariffs are filed with the Commission every year. The Southern Freight Tariff Bureau alone makes several thousand filings. Filings are also made by about ten other tariff publishing bureaus serving the railroads and by many individual railroads. Other filings are made by trucking bureaus, individual truck lines, and by water carriers.[49] Still other filings, with other agencies, are made by telephone companies and natural gas pipelines under statutes similarly providing for suspension and investigation.[50] These statutes are modeled on the Interstate Commerce Act, and often construed in reliance on precedents under the Act.

Until today, the Commission has been able to dispose of requests to suspend and investigate such tariffs based on swift and informal judgments. See *Port of New York Authority* v. *United States, supra,* 451 F.2d at 789-90. Yet, as the lower court recognized, an incident of judicial review would be significantly to enlarge and alter this preliminary assessment.[51] The in-

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[49] The basic suspension and investigation powers of the Commission are applicable to both motor carriers and water carriers. See Section 216(g), 49 U.S.C. § 316(g) (trucks); Section 307(g), 49 U.S.C. § 907(g) (water carriers); now codified as 49 U.S.C. § 10708.

[50] See, *e.g.,* Section 204 of the Communications Act, 47 U.S.C. § 204; Section 4 of the Natural Gas Act, 15 U.S.C. § 717c.

[51] The lower court in fact complained that the Commission's "order reflects no supporting findings or a reasonable basis for [declining to investigate], at least with respect to the charged § 4(1) violations." A. 313. Such a requirement may well be appropriate for judicial review, but it is directly inconsistent with the informal agency process. Significantly, the Act itself does not require any statement of reasons or findings when the Commission

creased burden on the Commission is manifest.[52]

Additional judicial review proceedings may also be anticipated. Under the lower court's decisions a shipper has little to lose, if the Commission declines to begin a suspension and investigation proceeding, in challenging that refusal in court on the ground that the Commission has breached its alleged "duty . . . to investigate substantial issues" and has not provided "supporting findings or a reasonable basis for so doing." A.312, 313. If review is sought in even a limited number of the thousands of instances in which tariffs are filed each year, but not investigated by the Commission, there will be a significant upsurge in appellate litigation.

Indeed, the shipper has every incentive to seek such review of a refusal to suspend and investigate, because the lower court's approach provides him with "two bites at the same apple." If the refusal to suspend and investigate is judicially reviewable, the shipper can attack the rate at that point, seeking simultaneously to stay the rate adjustment. If the challenge is unsuccessful and the Commission's refusal to investigate is upheld as a reasonable exercise of discretion, the shipper

declines to suspend or investigate. Compare Section 15(7), no longer applicable to rail carriers, requiring a statement of reasons only where a rate *is* suspended. 49 U.S.C. § 15(7), now codified as § 10708.

[52] This increased burden could well delay the Commission in the timely discharge of its basic responsibility to decide cases on the merits. Yet, in the 4R Act, Congress expressed serious concern about the adverse impact of Commission delay and sought to prompt the agency toward swifter resolution. See § 101(b) of the 4R Act; S. Rep. No. 449, 94th Cong., 1st Sess. 10-11, 15 (1975).

can then file a complaint under Section 13(1) to obtain a final Commission adjudication. That adjudication can, of course, be followed in turn by a second judicial review proceeding brought by the losing party after the Section 13(1) proceeding is concluded.[53]

Each judicial proceeding would not only consume the time of the Commission and the courts, but would increase the risk of a forbidden intrusion by courts into the Commission's sphere of primary jurisdiction. It is difficult, if not impossible, for a court to review a Commission's refusal to investigate without expressing its own preliminary views on the substance or lack of substance in the charges; and this is amply confirmed by the statements of the lower court in this very case. See, *e.g.*, A. 313. Such pronouncements, however, are precisely the kind of interference against which this Court warned in the *Wichita Board of Trade* case as threatening to disrupt the delicate balance between agency independence and judicial oversight. See p. 18, above.

An especially significant threat to the rate-making process would arise from the attempt of shippers, incident to judicial review of refusals to investigate, to stay the rate adjustment pending judicial review. Such

[53] The initial decision on judicial review would rarely be preclusive, even if it sustained the Commission's refusal to investigate. Since the Commission would only be considering whether there were reasonable grounds for investigation, it would always be possible for the court to affirm the Commission's decision not to investigate while, in a subsequent Section 13(1) proceeding triggered by a complaint, a shipper might nevertheless prove the rate to be unlawful. Moreover, even assuming that the Commission then held against the shipper on the merits in the Section 13(1) proceedings, the shipper would not be precluded from obtaining judicial review again to challenge the Commission's actual adjudication of the lawfulness of the rate based on a full record.

a stay, which was temporarily granted by the lower court in the present case (see p. 8, above), is in the railroads' view plainly invalid under the *Arrow* doctrine.[54] The fact remains, however, that the courts do seek to stay rate adjustments once they are persuaded that they have jurisdiction to review asserted agency error (see A.295), and reversal of stays by this Court can rarely come quickly enough to prevent the irreparable loss of revenues to the railroads.[55]

The consequences that would ensue, if the lower court's decision were sustained, are doubly unjustifiable in the face of recent Congressional policy. In the 4R Act Congress expressed repeated concern with overzealous regulation, with the "inflexibility" of the present regulatory scheme, and with attendant "delays" in implementing rate adjustments which are "particularly troublesome in our current inflationary system." See S. Rep. No. 499, 94th Cong., 1st Sess. 10-11, 15 (1975).[56]

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[54] In both *Arrow* and *SCRAP I*, this Court reaffirmed that the courts are prohibited from seeking to stay or enjoin rates on which the Commission has not yet reached a final determination. See also *Aberdeen & R.R.R.* v. *SCRAP, supra,* 422 U.S. at 317. In this case, the Commission manifestly has not made a final determination of the lawfulness of any rate. See pp. 15-16, above. Notwithstanding the lower court's continued insistence that it has power to issue a stay (see A. 300, 307), its actions clearly defined the explicit prohibition of this Court repeated in three leading decisions.

[55] As noted above, the railroads' losses are irreparable when an increase is postponed by a stay, as this Court has recognized in the past. See *United States* v. *SCRAP, supra,* 412 U.S. at 697. By contrast, the shippers have nothing to lose in seeking a stay since a postponed increase is, for their purposes, a permanent gain.

[56] Among other reforms, Congress in the 4R Act imposed new limitations on the suspension of newly filed railroad rates (Section 15(8)(d)) and, in certain circumstances, wholly prohibited use of the suspension power. Section 15(8)(b).

The lower court's decision moves to frustrate the very objectives of reduced bureaucracy and lessened delay that Congress aimed to achieve in its latest reform of the Act.

The untoward results of judicial review at this stage might not preclude review if Congress' intent to allow such review were clear and review were consistent with principle and precedent. Here, however, the statutory language, exhaustion doctrine, and prior decisions all point in exactly the opposite direction. The strong policy considerations militating against review provide the final and conclusive reason why the lower court's departure from existing law should be reversed.

CONCLUSION

For the reasons stated, the decision below should be reversed.

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ADDENDUM

Section 13(1) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provided:

> Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(8) of the Interstate Commerce Act, as amended, 49 U.S.C. § 13(1), provided:

> (8)(a) Whenever a schedule is filed with the Commission by a common carrier by railroad stating a new individual or joint rate, fare, or charge, or a new individual or joint classification, regulation, or practice affecting a rate, fare, or charge, the Commission may, upon the complaint of an interested party or upon its

own initiative, order a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice. The hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Such hearing shall be completed and a final decision rendered by the Commission not later than 7 months after such rate, fare, charge, classification, regulation, or practice was scheduled to become effective, unless, prior to the expiration of such 7-month period, the Commission reports in writing to the Congress that it is unable to render a decision within such period, together with a full explanation of the reason for the delay. If such a report is made to the Congress, the final decision shall be made not later than 10 months after the date of the filing of such schedule. If the final decision of the Commission is not made within the applicable time period, the rate, fare, charge, classification, regulation, or practice shall go into effect immediately at the expiration of such time period, or shall remain in effect if it has already become effective. Such rate, fare, charge, classification, regulation, or practice may be set aside thereafter by the Commission if, upon complaint of an interested party, the Commission finds it to be unlawful.

(b) Pending a hearing pursuant to subdivision (a), the schedule may be suspended, pursuant to subdivision (d), for 7 months beyond the time when it would otherwise go into effect, or for 10 months if the Commission makes a report to the Congress pursuant to subdivision (a), except under the following conditions:

(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of

section 2, 3, or 4 of this title or, following promulgation of standards and procedures under section 1(5)(d) of this title, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this title, over the service to which such rate increase applies; or

(ii) in the case of a rate decrease, a rate may not be suspended on the ground that it is below a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this title, or for the purposes of investigating such rate change upon a complaint that such rate change constitutes a competitive practice which is unfair, destructive, predatory or otherwise undermines competition which is necessary in the public interest.

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after February 5, 1976;

(ii) the common carrier by railroads notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii)

of this subdivision within the second 365 day-period following February 5, 1976, is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complainant; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

(e) If a hearing is initiated under this paragraph with respect to a proposed increased rate, fare, or charge, and if the schedule is not suspended pending such hearing and the decision thereon, the Commission shall require the railroads involved to keep an account of all amounts received because of such increase from the date such rate, fare, or charge became effective until the Commission issues an order or until 7 months after such date, whichever first occurs, or, if the hearings are extended pursuant to subdivision (a), until an order issues or until 10 months elapse, whichever first occurs. The account shall specify by whom and on whose behalf the amounts are paid. In its final order, the Commission shall require the common carrier by railroad to refund to the person on whose behalf the amounts were paid that portion of such increased rate, fare, or charge found to be not justified, plus interest at a rate which is equal to the average yield (on the date such schedule is filed) of marketable securities of the United States which have a duration of 90 days. With respect to any proposed decreased rate, fare, or charge which is suspended, if the decrease or any part thereof is ultimately found to be lawful, the common carrier by railroad may refund any part of the portion of such decreased rate, fare, or charge found justified if such carrier makes such a refund available on an equal basis to all shippers who participated in such rate, fare, or charge according to the relative amounts of traffic shipped at such rate, fare, or charge.

(f) In any hearing under this section, the burden of proof is on the common carrier by railroad to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. The Commission shall specifically consider, in any such hearing, proof that such proposed changed rate, fare, charge, classification, rule, regulation, or practice will have a significantly adverse affect in violation of section 2 or 3 of this title) on the competitive posture of shippers or consignees affected thereby. The Commission shall give such hearing and decision preference over all other matters relating to railroads pending before the Commission and shall make its decision at the earliest practicable time.

Section 15(17) of the Interstate Commerce Act, as amended, 49 U.S.C. § 15(17), provided:

Within 1 year after February 5, 1976, the Commission shall establish, by rule, standards and expeditious procedures for the establishment of railroad

rates based on seasonal, regional, or peak-period demand for rail services. Such standards and procedures shall be designed to (a) provide sufficient incentive to shippers to reduce peak-period shipments, through rescheduling and advance planning; (b) generate additional revenues for the railroads; and (c) improve (i) the utilization of the national supply of freight cars, (ii) the movement of goods by rail, (iii) levels of employment by railroads, and (iv) the financial stability of markets served by railroads. Following the establishment of such standards and procedures, the Commission shall prepare and submit to the Congress annual reports on the implementation of such rates, including recommendations with respect to the need, if any, for additional legislation to facilitate the establishment of such demand-sensitive rates.